Supreme Court, U.S.
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No. ——

In The Supreme Court of the United States

STAFF SERGEANT KELLY S. ERICKSON,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Article 3(a), Uniform Code of Military Justice, was unconstitutionally applied to the appellant and thereby precluded court-martial jurisdiction.

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The petitioner, Staff Sergeant Kelly S. Erickson, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on June 22, 2007.

CITATIONS AND OPINIONS

The order and judgment of the United States Court of Appeals for the Armed Forces, *United States v. Erickson*, 65 M.J. 221 (C.A.A.F. 2007), dated 22 June 2007, is located at Appendix A. The published opinion of the United States Air Force Court of Criminal Appeals, *United States v. Erickson*, 63 M.J. 504 (A.F. Ct. Crim. App. 2006), dated 28 April 2006, is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on June 22, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 3(a), UCMJ, 10 U.S.C. § 803(a), states:

> ...a person who is in a status in which the person is subject to this chapter and who committed an offense against this chapter while

> formerly in a status in which the person was subject to this chapter is not relieved from amenability to the jurisdiction of this chapter for that offense by reason of a termination of that person's former status.

STATEMENT OF THE CASE[1]

This case presents the question of whether Article 3(a), UCMJ, 10 U.S.C. § 803(a), subjected the appellant to court-martial jurisdiction when the crimes he allegedly committed occurred during a previous enlistment and he thereafter separated the Army, experienced a break in service, and subsequently enlisted in the Air Force.

The appellant enlisted in the United States Army on 22 January 1993. He served in the Army until 14 June 2001, when he received an honorable discharge. On 29 August 2001, the appellant enlisted in the United States Air Force for a term of four years.

During the appellant's court-martial, the military judge *sua sponte* questioned the trial

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[1] Facts contained within this writ are provided as determined by the Air Force Court of Criminal Appeals. *See United States v. Erickson*, 63 M.J. 504 (A.F. Ct. Crim. App. 2006) (Appendix B).

counsel about their position regarding the appellant's "break in service and how it may affect the very specifications that go back beyond September of -- excuse me, August of 2001." The trial counsel's position was

> that during all the relevant charged time frames the accused was a member of the United States Army and that the break in service does not in any way vitiate or affect the United States' jurisdiction over the charged offenses. At all the relevant charged time frames the accused was a member of the United States Army or the United States Air Force and was at all relevant times subject to the Uniform Code of Military Justice.

The defense concurred with this position with regard to the charged offenses. The military judge admitted that the "jurisdictional impact of a break in service" and a change in branch of service was an issue that he had not considered.

Although he could not find any cases directly on point, the military judge concluded:

> Article 3(a), Uniform Code of Military Justice, which the current version became effective on 23

> October 1992, clearly states that despite a break in service, that when somebody reenters military service and I don't believe it makes any difference which branch it may be, whether they are the same, different, or what have you, that once an individual comes back on active duty then for offenses that occurred during a previous service over which the military courts had subject matter jurisdiction, given the fact that the court's [sic] currently have in personam jurisdiction by virtue of the fact that the individual is currently on active duty, that Article 3(a) would change a previous state of the law to indicate that the court retains jurisdiction over the offenses occurring in the previous enlistment.

Trial counsel and defense counsel both concurred with the military judge's understanding of Article 3(a), UCMJ, and its application to the appellant's offenses. As a result, the military judge continued his guilty plea inquiry. In accordance with his pleas, the military judge found the appellant guilty of one specification of violating a lawful order, two specifications of raping a female

under the age of 12 years, one specification of sodomy with a female under the age of 12 years, two specifications of committing an indecent act upon a female under the age of 16, three specifications of taking indecent liberties with a female under the age of 16, and one specification of communicating indecent language to a female under the age of 16, in violation of Articles 92, 120, 125, and 134, UCMJ. Additionally, the appellant pled not guilty to one specification of perjury, in violation of Article 134, UCMJ. The appellant was found not guilty of perjury, but guilty of obstruction of justice. The military judge sentenced the appellant to a dishonorable discharge, confinement for life with the possibility of parole, and reduction to E-1.

REASONS FOR ISSUING THE WRIT

Appellant cites *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), as the leading Supreme Court case relevant to this issue. Since *Toth's* publication a half century ago, it has been universally accepted that courts-martial possess limited jurisdiction, aimed at specific ends.

Toth served the Air Force in Korea and was then honorably discharged. He returned to his home in Pittsburgh and worked in a steel plant. Five months later, he was arrested by military authorities for murder and conspiracy to commit

murder while in Korea. He was returned from Pittsburgh to Korea to stand trial before a court-martial. The District of Columbia Court of Appeals held that civilian ex-servicemen like Toth could constitutionally be tried by court-martial. This Court granted certiorari on the issue. *Id.* at 13.

This landmark case held that 1950 legislation purporting to permit military trials in such cases exceeded the outer limits of court-martial jurisdiction; it could not be sustained on the constitutional power of Congress "To raise and support Armies," "To declare War," or to punish "Offences against the Law of Nations." Neither could authority over civilians rest on the President's power as commander-in-chief, or on any theory of martial law. Finally, the power granted Congress "To make Rules for the Government and Regulation of the land and naval Forces," as supplemented by the Necessary and Proper Clause could not salvage jurisdiction. *Id.* at 13-14.

It has never been intimated by the Supreme Court, however, that Article I military jurisdiction could be extended to civilian ex-soldiers who had severed all relationship with the military and its institutions. To allow this extension of military authority would require an extremely broad construction of the language used in the constitutional provision relied on. Given its natural

meaning, the power granted Congress "To make Rules" to regulate "the land and naval Forces" would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces. There is a compelling reason for construing the clause this way: any expansion of court-martial jurisdiction like that in the 1950 Act necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals. *Id.* at 15.

The Court continued:

> We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property. Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that

> those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served.

Id. at 17.

Appellant contends that Article 3, UCMJ, as applied here, flouts bedrock principles enunciated in *Toth*. One who is discharged from the service or who otherwise terminates his status subject to the Code may not be tried by court-martial for an offense committed prior to discharge or termination of status; this is so even if that person later again becomes subject to the UCMJ.

The new, anarchic view carries military jurisdiction far beyond the rationale set forth in *Toth*: Military jurisdiction in a free Republic goes only to the point necessary for the armed forces to achieve their primary business -- fighting wars. The military cannot try former military personnel accused of stateside offenses when civilian courts are open and functioning.

Congressional legislation is circumscribed by the safeguards of the Constitution and interpretation of the courts. Nothing has changed since *Toth*. *Toth* invalidated Article 3(a) of the Code -- at least insofar as it purported to grant jurisdiction to courts-martial over persons who had severed all military

connections. *See* Zeigler, The Termination of Jurisdiction over the Person and the Offense, 10 Mil. L. Rev 139, 142 (October 1960).

Civilian courts remain open and ready to proceed, especially in cases such as this when the offenses are not uniquely military in nature. Furthermore, it was the understanding of both this appellant and the Army that he was being returned to civilian status. *See generally* Zeigler, *supra* at 164. The hiatus was a half year in duration. His subsequent entry into the Air Force was an entirely new term of service.

Congress creates court-martial jurisdiction pursuant to its supervisory powers over the military. Fulfilling its role under the Separation of Powers, the judiciary sets acceptable limits on military jurisdiction. As already noted, *Toth* held that 1950 legislation purporting to extend court-martial jurisdiction to the crimes of former service members improper under any of the various constitutional powers enjoyed by Congress. Justice Black explained that while Congress's authority to create court-martial jurisdiction:

> sprang from the belief that within the military ranks there is need for a prompt, ready-at hand means of compelling obedience and order[,]... Army discipline will not be

> improved by court-martialing rather than trying by jury some civilian ex-soldier who has been wholly separated from the service for months, years or perhaps decades. Consequently considerations of discipline provide no excuse for new expansion of court-martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury.

Id. at 22-23 (emphasis added).

Because it exceeds constitutional limitations, Article 3(a) was unconstitutionally applied here. Playing its part in the Separation of Powers, the Supreme Court has ruled that Congress enjoys no more and no less jurisdiction than permitted by Article I, Section 8, Clause 14 of the Constitution and its judicial interpretations. *Toth*, supra, at 15. Legitimacy of a court-martial proceeding depends on whether military authority validly exists over both the person and the act.

In examining the exercise of military jurisdiction, the Court in *Toth* emphasized that Article I, § 8, Cl. 14 limits military jurisdiction, and that Congress could never claim continuing court-martial jurisdiction. *Id.*

The Court first reasoned that the nexus between the military and unconditionally discharged ex-soldiers was too attenuated. It then determined that such an extension of court-martial sway exceeded "the least possible power adequate to the end proposed;" i.e., supervisory regulation of the armed forces.

Toth has never been overruled. The broadened claim of jurisdiction deemed unconstitutional in 1955 remains unconstitutional today:

> Whenever an enactment of Congress to cure weaknesses in criminal procedure is declared unconstitutional by this Court on the ground of lack of legislative power, the door is closed for all practical purposes forever on the method that Congress deems effective for correcting crime. Only an overruling of this case can change today's constitutional determination.

Toth, supra at 24 (Reed, J. dissenting) (emphasis added).

The appellant argues that the claimed jurisdiction over him fails for the precise reasons enunciated in *Toth*. His later enlistment in the Air Force does not alter the fact that his relationship to

the Army was completely severed for six months after his honorable discharge. He held no continuing service obligation of any sort. Like Toth, the appellant became a civilian and was available to be tried before an Article III court.

Military jurisdiction is created by statute. However, it is limited to those constitutionally brought to court-martial. *See United States v. Smith*, 4 M.J. 265, 266 (C.M.A. 1978). Appellant's case involves a novel prosecution theory of revived or continuing jurisdiction. Congress's grant of court-martial jurisdiction may under extremely limited circumstances, extend after a person has been separated from the service. However, courts have applied this concept most sparingly; objectively, the handful of exceptions lie comfortably within Constitutional standards.

In *Willenbring v. Neurater*, 48 M.J. 152 (C.A.A.F. 1998), the Court decided a case on similar facts to the case at bar. However, it does not resolve the Constitutional jurisdictional challenge posed here. Willenbring was an Army Reservist seeking extraordinary relief. The Court held that, under applicable military statutes, jurisdiction existed over him after his military status had completely terminated -- but only since the offense could not be tried in civil court and the maximum possible confinement was five years or more. The

Court also held that the statute authorizing Reserve activation for disciplinary purposes extended to offenses occurring during either prior regular or reserve duty. This case fails to resolve whether it was constitutionally permissible to extend the reach of Article 3.

The Court began by reiterating long-established rules:

> Jurisdiction of courts-martial is governed by statutes enacted under the constitutional power of Congress to establish 'Rules for the Government and Regulation of the' armed forces. U.S. Const. art. I, § 8, cl. 14. Congress and the courts have ensured that military trials are similar in many respects to civilian proceedings, but it is well established that courts-martial--which are authorized by statutes enacted pursuant to Article I of the Constitution -- need not provide a military accused with the same procedural rights available to a civilian defendant in a criminal trial conducted under Article III.

Id. at 157 (emphasis added).

Given these differences, both the Supreme Court and military courts have insisted that courts-martial not exercise jurisdiction beyond that granted by applicable statutes.

The *Willenbring* Court then listed some examples:

> As a matter of constitutional law, the Supreme Court has held that Congress may not extend court-martial jurisdiction to cover civilians who have no military status in peacetime, even if they are accompanying United States forces overseas as employees or dependents. Likewise, a court-martial may not exercise jurisdiction over a former service member whose relationship with the armed forces has been severed completely as a result of a valid discharge and who is not otherwise in a status that is subject to court-martial jurisdiction. *See United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14-15 (1955); *Smith v. Vanderbush*, 47 M.J. 56, 58-59 (C.A.A.F. 1997).

Id. at 157.

The Court suggested that discharge or other separation from military service need not preclude trial by court-martial if, at the time military jurisdiction is claimed, the individual is still a member of the armed forces "or is otherwise in a status subject to military law":

> For example, a prisoner in the custody of the armed forces as a result of a court-martial sentence remains subject to court-martial jurisdiction regardless of a discharge from military service. *See* Art. 2(a)(7); *Kahn v. Anderson*, 255 U.S. 1, 7-8 (1921); *United States v. Nelson*, 33 C.M.R. 305, 306-07 (C.M.A. 1963). In addition, a service member who is discharged before his enlistment expires and immediately reenlists may be tried for pre-discharge offenses occurring during the prior enlistment. *See United States v. Clardy*, 13 M.J. 308, 316 (C.M.A. 1982). Likewise, certain statutorily designated categories of military retirees are subject to trial by court-martial, including trial for offenses committed during a prior enlistment,

> even though they no longer are performing military duties. See Arts. 2(a)(4)-(5) and 3(a); *United States v. Sloan*, 35 M.J. 4, 7-8 (C.M.A. 1992); *Pearson v. Bloss*, 28 M.J. 376 (C.M.A. 1989).

Id. at 158.

The Court noted that Willenbring was subject to an earlier version of Article 3(a). Accordingly, the case does not resolve an attempted expansion of military jurisdiction under subsequent legislation. *Willenbring* should not be interpreted to say that one subject to military jurisdiction at the time of the court-martial and at the time of the offense might be tried by the military. First, Willenbring was still a Reservist. Second, his case was decided under a different statute. It follows that his case did not push beyond the Constitutional cautions and limitations declared in *Toth*. What is not decided or addressed in *Willenbring* is the instant question: Is this extension of "jurisdiction" on the appellant's fact pattern Constitutionally permissible under *Toth*?

As universally conceded, *Toth* held that it was Constitutionally impermissible to try a former service member by court-martial for prior service offenses. The ruling was definitive. Justice Black stated:

> Court-martial jurisdiction sprang from the belief that within the military ranks there is need for a prompt, ready-at-hand means of compelling obedience and order. But Army discipline will not be improved by court-martialing rather than trying by jury some civilian ex-soldier who has been wholly separated from the service for months, years or perhaps decades. Consequently considerations of discipline provide no excuse for new expansion of court-martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury.

Id. at 22-23 (emphasis added).

Despite any *Willenbring* dicta to the contrary, the Supreme Court did not say reentry into the service would revive jurisdiction. If anything, *Toth* held the precise opposite. So does a century and a half of precedent.

Willenbring is distinguishable. It deals with an earlier version of the UCMJ designed to permit courts-martial to hear cases where civilian courts are unavailable. More importantly, it did not resolve the precise Constitutional issue raised here –

whether a legislative attempt to establish "revived" jurisdiction is unconstitutional under *Toth* as a violation of Separation of Powers.

This appellant insists he is not subject to a military trial. He argues that his reenlistment following a total discharge does not resurrect court-martial authority for pre-discharge offenses. This is particularly true when there was no intent of the parties (individual and Government) to effectuate continuous service.

CONCLUSION

The UCMJ did not have jurisdiction to court-martial the appellant. Article 3(a) legally precluded the government from prosecuting the appellant for prior enlistment crimes when a clear break in service subsequently occurred. The petitioner therefore respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A[2]

UNITED STATES, Appellee

v.

Kelly S. ERICKSON, Staff Sergeant, U.S. Air Force, Appellant

No. 06-0715

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

65 M.J. 221

February 27, 2007, Argued
June 22, 2007, Decided

COUNSEL: For Appellant: Captain Griffin S. Dunham (argued); Lieutenant Colonel Mark R.

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[2] Although the Court of Appeals for the Armed Forces opinion does not contain reference to the jurisdictional issue currently petitioned before this Court, it nevertheless affirmed the decision of the Air Force Court of Criminal Appeals and thereby preserved the issue for this Court.

Strickland and Major David P. Bennett (on brief).

For Appellee: Major Kimani R. Eason (argued); Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs, and Major Matthew S. Ward (on brief).

JUDGES: ERDMANN, J., delivered the opinion of the court, in which EFFRON, C.J., and RYAN, J., joined. STUCKY, J., filed a separate opinion concurring in the result, in which BAKER, J., joined.

OPINION BY: ERDMANN

Staff Sergeant Kelly S. Erickson was tried at McChord Air Force Base (AFB), Washington, by a military judge sitting as a general court-martial. He was charged with numerous sexual offenses involving his minor daughters as well as subornation of perjury and violating a no-contact order. Under a pretrial agreement, Erickson entered guilty pleas to the sexual offenses and a plea of not guilty to the perjury charge. The military judge accepted Erickson's guilty pleas and found him guilty of the lesser included offense of obstruction of justice under the perjury charge.

Erickson was sentenced to reduction to airman basic (E-1), dishonorable discharge and confinement for life with eligibility for parole. The sentence was approved by the convening authority with mandatory forfeitures deferred and waived for the benefit of Erickson's family. The United States Air Force Court of Criminal Appeals affirmed the findings and sentence. *United States v. Erickson*, 63 M.J. 504 (A.F. Ct. Crim. App. 2006).

When arguing for what is perceived to be an appropriate sentence, the trial counsel is at liberty to strike hard, but not foul, blows." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000).

We granted review in this case to determine whether trial counsel committed plain error during his sentencing argument by comparing Erickson to Hitler, Saddam Hussein, and Osama bin Laden, and describing him as a demon belonging in hell. We conclude that Erickson has failed to establish plain error and therefore affirm the decision of the Court of Criminal Appeals.

BACKGROUND

Erickson admitted to a number of sexual offenses that occurred between 1996 and 2002, including the rape of his older daughter and rape, sodomy, indecent acts, indecent liberties and using indecent language with his younger daughter. During sentencing, the Government introduced

Stipulations of Expected Testimony from the two girls as evidence in aggravation. The older daughter stated that when she was about eight years old, Erickson would kiss and fondle her, put his hands down her pants and penetrate her with his fingers. On one occasion he had sex with her after offering her gifts. He later told her not to tell anyone about his conduct or he would go to jail.

Erickson abused the younger daughter starting when she was five and continuing until she was ten. He had sex with her as often as several times a day; had oral sex with her; attempted anal sex; fondled and kissed her; took showers and baths with her; penetrated her with a dildo; showed her pornographic videos; placed her in sexual situations with her brother and the family dog; took naked pictures of her; and had phone sex with her.

At the sentencing phase of Erickson's court-martial, trial counsel introduced his sentencing argument to the military judge with the following remarks:

> What is evil? It's a dramatic question. It is not a concrete question and it defies a scientific answer. It likely means something different to virtually everyone. History, current events, are replete with examples of people who have been argued who are the embodiments of evil, Adolph

Hitler, Saddam Hussein, Osama bin Laden. Men who have killed innocent women and children, poisoned the world with their rage and their fanaticism. Well, as awful as those men and those actions are there is an advantage, frankly, to evil that eventually becomes so open and notorious. You can see it coming. You can prepare your defenses. It has been quipped countless times that the greatest trick the devil ever performed was convincing the world that he didn't exist. The message there is that the evil that you can't see coming, the evil that is hidden, that is so insidious. Evil can hide the pitchfork, hide the horns, hide the tail. It can hide behind a facade of respectability, a facade of caring. Even a facade of, well, this accused. Staff Sergeant Erickson, sitting here in this courtroom, right here, right now, is evil. The insidious type.

. . .

This demon so masterfully manipulated his victims for so long a period of time, the little girls still don't see the evil.

In closing, trial counsel continued: "He is evil. The place for evil, of course, is hell. His children should not suffer him a single day of freedom before he goes there. Society should not suffer him a single day of freedom before he goes there."

Defense counsel did not object at any point to this part of trial counsel's argument. On appeal to the Court of Criminal Appeals, Erickson argued that "the trial counsel improperly inflamed the passions and appealed to potential religious biases of the military judge during his argument" and asked the lower court to order a rehearing on the sentence or reduce it to no greater than forty years. *Erickson*, 63 M.J. at 509. While the Air Force court held that the comments in this case went well outside the bounds of fair comment and amounted to plain and obvious error, it found no material prejudice to Erickson's substantial rights. *Id.* at 509-10. The lower court held that there was no clear evidence the military judge considered the comments and that the misconduct in this case was so severe that the military judge would have imposed the same sentence regardless of the comments. *Id.*

DISCUSSION

When a defense attorney fails to object to a sentencing argument at the time of trial, appellate

courts review the statement for plain error. *United States v. Barrazamartinez*, 58 M.J. 173, 175 (C.A.A.F. 2003); *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001). In order to prevail under a plain error analysis, Erickson must demonstrate that: "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000); *United States v. Finster*, 51 M.J. 185, 187 (C.A.A.F. 1999).

The sole issue before this court concerns the third element of the plain error test -- whether the error materially prejudiced a substantial right.[1] In assessing prejudice under the plain error test where prosecutorial misconduct has been alleged: [W]e look at the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial. . . . We believe the best approach involves a balancing of three factors: (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction. *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005). Although the second *Fletcher* factor adds little to the analysis in a judge alone trial, there is no reason not to apply the first and third factors in that context. We consider the *Fletcher* factors to determine whether "trial counsel's comments, taken as a whole, were so

damaging that we cannot be confident" that Erickson was sentenced "on the basis of the evidence alone." *Id.*

FOOTNOTES

1 The Court of Criminal Appeals' decision concerning the first two prongs of the plain error test was not appealed to this court. Where neither party appeals a ruling of the court below, that ruling will normally be regarded as law of the case and binding upon the parties. United States v. Parker, 62 M.J. 459, 464 (C.A.A.F. 2006). Where there is no appeal, this court will not review the lower court's ruling unless "the lower court's decision is 'clearly erroneous and would work a manifest injustice' if the parties were bound by it." United States v. Doss, 57 M.J. 182, 185 (C.A.A.F. 2002) (citation omitted). Neither party argued that the rulings were clearly erroneous or would work a manifest injustice.

Severity of the misconduct. Erickson argues that trial counsel's misconduct was severe because he invoked infamous enemies of the United States and sought to identify Erickson as a demonic figure. As a result, he concludes, the military judge could not separate his personal religious views from his sentencing decision. The Government responds that

because the improper references constituted a relatively limited portion of trial counsel's lengthy sentencing argument, the misconduct was not severe.

In *Fletcher*, this court evaluated the severity of trial counsel's improper comments based on, inter alia, "the raw numbers -- the instances of misconduct as compared to the overall length of the argument," and the degree to which the improper references were spread throughout the argument or the case as a whole. 62 M.J. at 184; *see also United States v. Modica*, 663 F.2d 1173, 1181 (2d Cir. 1981). Here, the improper comments amounted to less than a single page out of trial counsel's twenty-two page sentencing argument. Although the improper references appeared at both the beginning and the end of the sentencing argument, they were confined to those locations and did not permeate the entire argument. No improper references were made during the Government's rebuttal sentencing argument.

The lower court found that the trial counsel's comparison of Appellant to Hitler, bin Laden, and Hussein was improper and "went well beyond the norm and were outside the bounds of fair comment." *Erickson*, 63 M.J. at 510. Nevertheless, these comments were made in the context of a permissible theme -- that unseen evil is worse than open and obvious evil. It reflected both the general

belief of young children that their father would not wish to do them harm and Erickson's actions to conceal his conduct. While we do not condone the references, in this context, and in view of the limited number of references in a lengthy argument, we do not consider the misconduct to be "severe."

Judge alone trial. Erickson contends that because the military judge listened to the argument without interruption, there were no measures taken to cure the error. The Government responds that in an argument before a military judge alone, the military judge need not act to cure misconduct because he is presumed to know and follow the law. *United States v. Rodriguez*, 60 M.J. 87, 90 (C.A.A.F. 2004).

In *United States v. Knickerbocker*, 25 C.M.A. 346, 2 M.J. 128, 129, 54 C.M.R. 1072 (C.M.A. 1977), this court emphasized the importance of swift corrective action by the military judge to remedy the effects on a court-martial panel of a prosecutor's improper comments. *See also Baer*, 53 M.J. at 239; *Berger v. United States*, 295 U.S. 78, 85, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). In this case, however, no panel heard trial counsel's improper remarks and the military judge had no obligation to provide an instruction. *Cf. United States v. Horn*, 9 M.J. 429, 430 (C.M.A. 1980). Military judges are presumed to know the law and

to follow it absent clear evidence to the contrary. *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997). As part of this presumption we further presume that the military judge is able to distinguish between proper and improper sentencing arguments. Erickson argues that since the military judge did not note that the references were improper and state on the record that he would not consider them, we do not know how he perceived the argument. Erickson fails, however, to provide any evidence that would rebut the presumption. There is nothing in the record that reflects that the military judge was biased or in any way swayed by the comments.

FOOTNOTES

2 While not the case here, if a defendant introduced evidence to rebut the presumption, we would then consider whether the military judge undertook "curative measures," such as a clear statement on the record that he would not consider the improper comments.

Weight of evidence supporting the sentence. Erickson argues that although the evidence against him was strong, it did not justify a sentence of confinement for life with eligibility for parole, which was greater than the usual sentence in child sexual abuse cases. The Government responds that

the evidence weighed heavily in favor of the sentence imposed because of the negative and ongoing impact of the abuse on Erickson's young victims.

While we recognize that Erickson received a sentence at the higher end of the sentencing spectrum for child sexual abuse cases, the facts in this case are particularly egregious. The sentence was not the highest possible sentence and the Court of Criminal Appeals found that it was appropriate in light of the evidence. Erickson's offenses carried the possibility of a sentence of confinement for life without the possibility of parole. *Manual for Courts-Martial, United States* pt. IV, para 45.e.(1) (2002 ed.); Rule for Courts-Martial (R.C.M.) 1003(b)(7). His adjudged sentence of confinement for life with eligibility for parole is therefore a lower sentence than he could have received.

R.C.M. 1001 allows the military judge to consider Erickson's admitted conduct with his children as well as the negative and continuing impact of that conduct as an aggravating factor. The sentence adjudged must be based on all relevant sentencing factors. R.C.M. 1001(b)(4); *United States v. Holt*, 33 M.J. 400, 408 (C.M.A. 1991). The evidence revealed not only that Erickson had sexually abused his two daughters over a sustained period, but that he manipulated them into believing

that the conduct was appropriate. He told them that if they revealed what he had done to them he would leave them and go to jail. As a consequence both girls lied to protect the very person abusing them.

Erickson's abuse has left his children emotionally scarred. His son provided testimony as to the impact of his father's abuse. His older daughter stated that she felt immense guilt, confusion, and fear about her ability to lead a normal life in the future. Perhaps the most tragic consequence of Erickson's conduct is that the younger daughter was so influenced by her father that she continued to defend him through the time of trial.[3] The clinical psychologist who was treating Erickson's son and younger daughter at the time of trial testified as to the lasting negative impact of Erickson's actions on both these children and the extended treatment they would require.

FOOTNOTES

3. In a Stipulation of Expected Testimony, the younger daughter stated: None of the things that happened between me and Dad would matter if no one else knew about it. I have never been scared of Dad. I don't like it that people only talk about the bad things about Dad. He is a really good man, and does lots of good things for me. I love him.

The offenses to which Erickson entered guilty pleas and his admitted conduct in connection with those offenses support a significant sentence. Added to this is the compelling evidence of the lasting negative impact of his offenses on his children. Erickson's comparison of his sentence to those in other cases involving child sexual abuse fails to account for the egregious record before us and therefore does not establish an "'obvious miscarriage[] of justice or abuse[] of discretion.'" *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999) (quoting *United States v. Dukes*, 5 M.J. 71, 73 (C.M.A. 1978)). We find that the weight of evidence clearly supports the Court of Criminal Appeals' determination that Erickson would have received the same sentence irrespective of trial counsel's improper comments.

Having reviewed the *Fletcher* factors, we conclude that there was no material prejudice to Erickson's substantial rights and therefore no plain error.

DECISION

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

CONCUR BY: STUCKY

STUCKY, Judge, with whom BAKER, Judge, joins (concurring):

I agree with the majority's conclusion that the military judge did not commit plain error, but write separately because the Court's reliance on the balancing test in *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005) appears misplaced in a judge-alone trial such as this.

In *Fletcher*, we appropriately found that determining the existence of prejudice caused by trial counsel's improper comments made before a court-martial including members depends on balancing the severity of counsel's misconduct against the military judge's curative measures and the weight of the evidence supporting conviction. *See id.* In other words, the more improper the argument, the greater the counterweight of curative measures and the weight of the evidence must be to overcome any potential prejudice.

In a judge-alone case like this one, curative measures are superfluous because the military judge is presumed to know and apply the law correctly. *United States v. Rodriguez*, 60 M.J. 87, 90 (C.A.A.F. 2004). The facts of this case are fortuitous in that the improper conduct is balanced by overwhelming evidence supporting conviction. As such, curative measures are unnecessary under

the *Fletcher* rubric. However, when this Court considers a future case in which trial counsel's egregious conduct is balanced against evidence of guilt of less than overwhelming weight, a *Fletcher* analysis would seem to require the military judge in that case to impose significant curative measures on himself to counterbalance the improper argument. This could not only lead to an absurd result, but also would contradict the principle that the military judge is presumed to know and apply the law correctly.

As an alternative to the Court's *Fletcher* analysis, I would have reviewed the record for any evidence of prejudice sufficient to rebut the presumption that the military judge knew and applied the law correctly. Seeing no such evidence, I concur with my colleagues that there was no material prejudice to Appellant's rights and, therefore, no plain error.

Appendix B

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant KELLY S. ERICKSON
United States Air Force

ACM 35495

63 M.J. 504

28 April 2006

Sentence adjudged 31 October 2002 by GCM convened at McChord Air Force Base, Washington. Military Judge: Rodger A. Drew (sitting alone).

Approved sentence: Dishonorable discharge, confinement for life with the eligibility for parole, and reduction to E-1.

Appellate Counsel for Appellant: Joseph Kastl, Esq. (argued), Colonel Beverly B. Knott, Colonel Carlos L. McDade, Major Terry L. McElyea, Major Sandra K. Whittington, Major L. Martin Powell, and Major David P. Bennett.

Appellate Counsel for the United States: Captain Kimani S. Eason (argued), Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Shannon J. Kennedy, Major Michelle M. McCluer, Major Carrie E. Wolf, and Jesse Coleman (legal intern).

Before

ORR, JOHNSON, and FINCHER

Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final publication.

ORR, Senior Judge:

The appellant was tried at McChord Air Force Base (AFB), Washington, by a military judge sitting as a general court-martial. In accordance with his pleas, the military judge found the appellant guilty

of one specification of violating a lawful order, two specifications of raping a female under the age of 12 years, one specification of sodomy with a female under the age of 12 years, two specifications of committing an indecent act upon a female under the age of 16, three specifications of taking indecent liberties with a female under the age of 16, and one specification of communicating indecent language to a female under the age of 16, in violation of Articles 92, 120, 125, and 134, UCMJ, 10 U.S.C. §§ 892, 920, 925, 934. Additionally, the appellant pled not guilty to one specification of perjury, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The appellant was found not guilty of perjury, but guilty of obstruction of justice. The military judge sentenced the appellant to a dishonorable discharge, confinement for life with the possibility of parole, and reduction to E-1. The convening authority approved the sentence as adjudged.

The case is before this Court for review under Article 66, UCMJ, 10 U.S.C. § 866. The appellant initially asserted four errors for our consideration: (1) Whether his sentence is inappropriately severe; (2) Whether he received ineffective assistance of counsel because his trial defense counsel erroneously advised him that he would be eligible for parole in 10 years so he rejected a pretrial agreement (PTA) that would have limited his confinement to 38 years; (3) Whether

the military judge erred by admitting uncharged misconduct; and (4) Whether trial counsel improperly compared him to Osama Bin Laden, Adolph Hitler, and the Devil during his sentencing argument. In a supplemental filing, the appellant raised four additional errors: (1) Whether his pleas were improvident because of his mental and emotional state at trial; (2) Whether the court-martial lacked jurisdiction to try him because Article 3(a), UCMJ, 10 U.S.C. § 803(a), is unconstitutional as applied to him; (3) Whether his plea to Charge I and its Specification was improvident; and (4) Whether his plea to Charge IV, Specification 5 was improvident.[3] On 14 February 2006, we heard oral argument in this case.

Background

On 31 January 2002, the appellant went to his church bishop for counseling. During the counseling session the appellant told the bishop that he had done something wrong in the past with his daughter. The bishop encouraged the appellant to reveal these wrongs to his wife as part of his repentance process. After the appellant confided in his wife that he had molested their daughter, he asked her for some time to turn himself in. After talking to several of her friends, she gave him an ultimatum. Specifically, if

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[3] All four supplemental issues are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

the appellant did not report himself to the authorities by the following Monday, 4 February 2002, she would. Her primary concern was that she did not want to risk losing her children because she did not turn the appellant in. She then took their ten-year-old daughter, BE, out to dinner and asked her whether her father had done anything wrong with her. BE disclosed that she had engaged in sexual intercourse and oral sodomy with her father. Additionally, she stated that her father had used sex toys on her, made her watch pornographic movies, and tried to get her to have sex with the neighbor's dog.

On 4 February 2002, the appellant told his commander, after rights advisement, that he had started sexually molesting his daughter a few years before. On 9 February 2002, agents from the Air Force Office of Special Investigations (AFOSI) interviewed BE. She said that she started having sexual intercourse with her father when she was four years old, and that her father fondled or had sexual intercourse with her almost every day since then, except on Sundays. She also described occasions when she showered with her father, engaged in oral and anal sodomy with him, and watched pornographic movies with the appellant. Additionally, BE revealed she lied at her father's previous court-martial involving indecent acts and indecent liberties with her then ten-year-old friend,

because her father discouraged her from telling the truth. She went on to talk about a phone conversation she had with her father during which he asked her to rub her private parts. The appellant also took nude photographs of BE during the 2001 Christmas break. Lastly, BE told the investigators that her father sat her atop her nude 1-year-old brother, and, encouraged her to have sex with a dog and with her 12-year-old brother, JE.

On 20 March 2002, AFOSI agents interviewed AE, the appellant's daughter from a previous marriage. AE told them that the appellant inserted his fingers into her vagina when she was nine years old and masturbated in her presence. When she was ten years old, he had sexual intercourse with her. He also placed his hands near her crotch during a game called "Chicken."[4]

Ineffective Assistance of Counsel

The appellant believes he received ineffective assistance of counsel because his trial defense counsel misinformed him about the minimum time that he would have to serve in confinement to be

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[4] From the record, it appears that "Chicken" is played when one person starts moving their hand up another person's leg, and when that person feels uncomfortable with where the other person's hand is at, they shout "chicken."

eligible for parole. Specifically, he asserts that his trial defense counsel told him he would be eligible for parole after serving 10 years' of confinement if he received a sentence that included confinement for life. Additionally, he claims his counsel told him he would also be eligible for parole in 10 years if he received any confinement greater than 30 years. Based on his understanding of his potential parole eligibility, he decided not to accept an offer for a PTA limiting his confinement to 38 years because he saw no practical benefit. However, once the appellant entered confinement, he discovered that he would not be eligible for parole until he had served at least 20 years of his sentence. See Department of Defense Instruction 1325.7, Administration of Military Correctional Facilities and Clemency and Parole Authority, ¶ 6.17.1.2.3 (17 Jul 2001). He avers that if his trial defense counsel had given him accurate information, he would have opted to accept the PTA. Based on his belief that he received erroneous advice, he asks this Court to reduce his sentence to include no more than 38 years' of confinement.

Claims of ineffective assistance of counsel are reviewed de novo. United States v. Wiley, 47 M.J. 158, 159 (C.A.A.F. 1997). To prevail on a claim of ineffective assistance of counsel, the appellant must show (1) that counsel's performance was deficient;

and (2) that counsel's deficient performance resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687 (1984). The deficiency prong of Strickland requires that the appellant show counsel's performance fell below an "objective standard of reasonableness," according to the prevailing standards of the profession. Id. at 688. There is a "strong presumption" that counsel was competent. Id. at 689. The prejudice prong requires that the appellant show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

Although the appellant claims his trial defense counsel gave him erroneous advice concerning the earliest date he could be considered for parole, his trial defense counsel disputes this assertion. In an affidavit filed with this Court, the defense counsel who was primarily responsible for preparing the sentencing portion of the case asserts that she never told the appellant there was no "practical difference, based on parole between a sentence of life confinement and a sentence of 38 years' confinement." After considering the factual allegations in the appellant's affidavit, the affidavit from his defense counsel, and the record as a whole, we find no reason to order a post-trial factfinding hearing pursuant to United States v. DuBay, 37

C.M.R. 411, 413 (C.M.A. 1967), to resolve any factual disputes. See United States v. Ginn, 47 M.J. 236, 248 (C.A.A.F. 1997).

Arguably, there is some dispute on the advice the appellant received about his earliest parole eligibility date, however, his counsel advised him to accept the PTA limiting confinement to 38 years on more than one occasion. Regardless of this advice, the appellant chose to reject the PTA limiting confinement to 38 years. Instead, he chose to offer and accept a PTA without a limitation on the amount of confinement hoping to receive a lower sentence from the military judge and leniency from the convening authority. As a result, the appellant has not convinced us that his decision to disregard his trial defense counsel's advice was based solely on the earliest possible parole eligibility date. Even if we assume that his trial defense counsel provided inaccurate information, their overall recommendation to accept the PTA was correct. Therefore, when viewing the possibility that the appellant received incorrect advice in the context of their entire representation, we are not convinced that he received ineffective assistance. See Kimmelman v. Morrison, 477 U.S. 365, 383-84 (1986).

Uncharged Misconduct

Next, the appellant argues that the military judge abused his discretion by denying a defense

motion to exclude portions of the stipulated testimony of his two daughters, AE and BE. The trial defense counsel argued that portions of the stipulated testimony should have been excluded because many of the incidents took place outside the charged timeframe or when the appellant was not subject to court-martial jurisdiction. The appellant also contends that portions of the stipulated testimony were inadmissible because his children described sexual activity that he was either not present for, or did not initiate. Although the appellant is not contesting the veracity of his children or the accuracy of their stipulated testimony, he asserts that the probative value of this evidence is substantially outweighed by the danger of unfair prejudice. See Mil. R. Evid. 403. As a result, the appellant asks this Court to set aside the sentence and order a rehearing or otherwise grant other meaningful relief.

The appellant's trial defense counsel objected to all or portions of 15 paragraphs of AE's stipulated testimony because they contained references that the appellant sexually molested her prior to the rape alleged in Charge II, Specification 1. Specifically, AE stated that the appellant French-kissed and fondled her at her grandmother's house. She also described how her father molested her in a motel swimming pool in her brother's presence and

ejaculated on her leg later that night inside the motel room while she was sleeping with him. She also stated that the appellant fondled her "a bunch of times" and attempted to have her perform oral sex upon him.

Additionally, the appellant's trial defense counsel objected to all or portions of seven paragraphs of BE's stipulation of expected testimony. The primary focus of their objection was to paragraph 21, which reads as follows:

> One time, the summer before Dad started the Air Force, he called me into the computer room to look at something. This was after he was out of the Army. He showed me a picture of a woman having sex with a dog. He asked me if I would do that with Sammie. I said OK. Sammie was a dog we were watching for some friends. Dad took me and Sammie into the basement. I took off my pants and underwear. I got down on my hands and knees. Dad put Sammie behind me on my back. Sammie's nails were scratching up my back and it hurt. I stood up so Sammie could not be on my back anymore. I said that I

> didn't want to do that anymore and Dad said OK and we went upstairs. The only thing that happened between me and Sammie was his nails scratched my back.

After hearing argument on the defense motion from counsel for both sides, the military judge found that the contested portions of the statements appeared to be either earlier than the charged timeframe or during the time after the appellant left the Army and before he joined the Air Force. As such, he said he would not sentence him for these offenses. Nevertheless, the military judge ruled that the lack of jurisdiction did not make it improper for him to consider the offenses as aggravation evidence because they were part of a "continuous course of conduct involving the same victim and the same types of misconduct." The military judge acknowledged that although the misconduct described in paragraph 21 of BE's stipulation of expected testimony was "different in some unique aspects from the charged misconduct," it was still a matter of sexual misconduct upon the same victim.

Having determined that he could properly consider the uncharged misconduct, the military judge performed a Mil. R. Evid. 403 balancing test. Our review of a military judge's decision to admit evidence is limited to whether he has abused his

discretion. United States v. Dorsey, 38 M.J. 244, 246 (C.M.A. 1993). To find an abuse of discretion, we must be convinced that the military judge's decision was "clearly untenable" and deprived the accused of a "substantial right such as to amount to a denial of justice." United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987) (quoting Guggenmos v. Guggenmos, 359 N.W.2d 87, 90 (1984).

In sentencing, "the trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." Rule for Courts-Martial (R.C.M.) 1001(b)(4). Evidence of aggravating circumstances qualifying for admission during presentencing must also pass the evidentiary rule requiring that the probative value of evidence outweigh its prejudicial effect. The military judge has wide discretion in applying this rule. United States v. Bailey, 55 M.J. 38, 41 (C.A.A.F. 2001).

The military judge, in allowing the stipulated testimony, stated:

> I believe that all this evidence is highly probative. It is certainly extremely prejudicial, but it is not unfairly prejudicial. That's the key. Indeed its prejudicial impact ties directly with its probative value. On the other hand, the fact that this is a

> judge alone trial is something that I am mindful of in that I can certainly put this evidence in its proper context, and without instructing myself, certainly will not sentence the accused for offenses of which he was not found guilty in this court-martial.

The military judge concluded his Mil. R. Evid. 403 balancing test by stating that the events described occurred and that the evidence was not unduly cumulative, a waste of time, or confusing. We agree.

We find that the evidence was clearly relevant, directly related to, and resulted from the appellant's acts. See R.C.M. 1001(b)(4). Furthermore, the probative value of the stipulated expected testimony was not substantially outweighed by undue prejudice. See Mil. R. Evid. 403. We note that the uncharged acts of misconduct were close in time to the charged offenses and involved the same victims. Additionally, this evidence illustrates a continuous course of conduct and is admissible as aggravation evidence during presentencing to show victim impact. See United States v. Nourse, 55 M.J. 229, 232 (C.A.A.F. 2001). The military judge expressly performed the balancing test of Mil. R. Evid. 403 and said he was confident he could avoid confusion

of the issues and would not be misled as to the appropriate weight to give the evidence. "It is undisputed that military judges are presumed to know the law and to follow it, absent clear evidence to the contrary." United States v. Mason, 45 M.J. 483, 484 (C.A.A.F. 1997) (citing United States v. Prevatte, 40 M.J. 396, 398 (C.M.A. 1994)). See also United States v. Hill, 62 M.J. 271, 276 (C.A.A.F. 2006). "When a judge indicates that he will not consider inadmissible evidence . . . we presume he will do as he says." United States v. Davis, 44 M.J. 13, 17.

In the instant case, the military judge correctly stated the law and expressed his intent to follow it. We find nothing that causes this Court to believe otherwise. The military judge did not abuse his discretion in admitting this evidence.

Improper Argument of Counsel

Next, the appellant asserts that the trial counsel improperly inflamed the passions and appealed to potential religious biases of the military judge during his argument in the sentencing portion of the trial and asks this Court to set aside the sentence and order a rehearing on sentence or approve a period of confinement no greater than 40 years. Specifically, the appellant contests the following portions of the trial counsel's argument:

What is evil? It's a dramatic question. It is not a concrete question and it defies a scientific answer. It likely means something different to virtually everyone. History, current events, are replete with examples of people who have been argued who are the embodiments of evil, Adolph Hitler, Saddam Hussein, Osama bin Laden. Men who have killed innocent women and children, poisoned the world with their rage and their fanaticism. Well, as awful as those men and those actions are there is an advantage, frankly, to evil that eventually becomes so open and notorious. You can see it coming. You can prepare your defenses. It has been quipped countless times that the greatest trick the devil ever performed was convincing the world that he didn't exist. The message there is that the evil that you can't see coming, the evil that is hidden, that is so insidious. Evil can hide the pitchfork, hide the horns, hide the tail. It can hide behind a façade of respectability, a façade of caring.

> Even a façade of, well, this accused. [The appellant], sitting here in this courtroom, right here, right now, is evil. . . . This demon so masterfully manipulated his victims for so long a period of time, the little girls still don't see the evil. . . . Simply put, this accused, is the boogeyman. . . . He is evil. The place for evil, of course, is hell. His children should not suffer him a single day of freedom before he goes there [Hell]. Society should not suffer him a single day of freedom before he goes there.

The standard of review for an improper argument depends on the content of the argument and whether the defense counsel objected to the argument. The legal test for improper argument is whether it was error and "whether it materially prejudiced the substantial rights of the accused." United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000). If the defense counsel fails to object or request a curative instruction, the court will grant relief only if the improper argument amounts to plain error. United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001); United States v. Boyd, 55 M.J. 217, 222 (C.A.A.F. 2001); United States v.

Powell, 49 M.J. 460, 464 (C.A.A.F. 1998); United States v. Fisher, 21 M.J. 327, 328 (C.M.A. 1986). See also R.C.M. 919(c), 1001(g). In the case sub judice, the trial counsel clearly expressed highly inflammatory opinions of the appellant in his sentencing argument. However, the trial defense counsel did not object to the improper argument and thus we apply a plain error analysis to determine whether relief should be granted.

The appellant argues that it was plain error for the trial counsel to refer to Adolph Hitler, Saddam Hussein, and Osama bin Laden, because their names were used only for their sensational value and to inflame the passions of the military judge. The government maintains that such matters were permissible because the references did not call for a particular result. The government also asserts that the appellant "opened the door to comments about religion" in his unsworn statement, when he said, "I grew up with a religious background." We find that the trial counsel's comparison of the appellant to these public and religious figures was error because it was designed to improperly influence the military judge's deliberations. See United States v. Clifton, 15 M.J. 26, 30 (C.M.A. 1983). Although references to "contemporary history" or other matters of common knowledge may be allowed, the specificity, detail, and provocation of his comments

went well beyond the norm and were outside the bounds of fair comment. See United States v. Barrazamartinez, 58 M.J. 173, 175 (C.A.A.F. 2003).

Moreover, this error was plain and obvious. When the trial counsel compared the appellant to these religious and public figures, he was inviting the military judge to increase the appellant's punishment based solely on an emotional basis. These arguments were clearly improper and should have been prohibited or stricken by the military judge. See Clifton, 15 M.J. at 30. To summarize, we find error in the trial counsel's open criticism and personal attack upon the appellant.

Because there was no objection to these plain and obvious errors, we must next determine whether they resulted in material prejudice to a substantial right of the appellant. Powell, 49 M.J. at 464-65. As stated earlier, this was a military judge alone trial. After reviewing the improper comments from the trial counsel's argument in the context that they were presented, we find that they did not materially prejudice the substantial rights of the appellant. See Baer, 53 M.J. at 237. Even though the military judge should not have heard the improper comments by the trial counsel, we found "no clear evidence" that he improperly considered them. See Mason, 45 M.J. at 484. Additionally, the misconduct in this case is so severe that we are

confident the military judge would have imposed the same sentence without considering the comments. See United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005).

Jurisdiction

Next, the appellant claims that the court-martial lacked jurisdiction to try him for the majority of the charged offenses because Article 3(a), UCMJ, is unconstitutional. Article 3(a), UCMJ, states:

> a person who is in a status in which the person is subject to this chapter and who committed an offense against this chapter while formerly in a status in which the person was subject to this chapter is not relieved from amenability to the jurisdiction of this chapter for that offense by reason of a termination of that person's former status.

The appellant enlisted in the United States Army on 22 January 1993. He served in the Army until 14 June 2001, when he received an honorable discharge. On 29 August 2001, the appellant enlisted in the United States Air Force for a term of four years.

Shortly after the appellant entered his pleas, the military judge sua sponte questioned the trial

counsel about their position regarding the appellant's "break in service and how it may affect the very specifications that go back beyond September of -- excuse me, August of 2001." The trial counsel's position was

> that during all the relevant charged time frames the accused was a member of the United States Army and that the break in service does not in any way vitiate or affect the United States' jurisdiction over the charged offenses. At all the relevant charged time frames the accused was a member of the United States Army or the United States Air Force and was at all relevant times subject to the Uniform Code of Military Justice.

The defense concurred with this position with regard to the charged offenses. The military judge admitted that the "jurisdictional impact of a break in service" and a change in branch of service was an issue that he had not considered.

Although he could not find any cases directly on point, the military judge concluded:

> Article 3(a), Uniform Code of Military Justice, which the current version became effective on 23

> October 1992, clearly states that despite a break in service, that when somebody reenters military service and I don't believe it makes any difference which branch it may be, whether they are the same, different, or what have you, that once an individual comes back on active duty then for offenses that occurred during a previous service over which the military courts had subject matter jurisdiction, given the fact that the court's [sic] currently have in personam jurisdiction by virtue of the fact that the individual is currently on active duty, that Article 3(a) would change a previous state of the law to indicate that the court retains jurisdiction over the offenses occurring in the previous enlistment.

Trial counsel and defense counsel both concurred with the military judge's understanding of Article 3(a), UCMJ, and its application to the appellant's offenses. As a result, the military judge continued his providence inquiry with the appellant.

During oral argument before this Court, the appellant's counsel conceded that the trial participants correctly interpreted Article 3(a),

UCMJ. He acknowledged that the Article, as written, conferred court-martial jurisdiction over the appellant and the offenses the appellant committed while serving in the Army. Nevertheless, the appellant asks this Court to set aside the findings for the offenses he committed while serving in the Army because Article 3(a), UCMJ, is unconstitutional as applied to him.

The appellant cites extensively to United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955), to support his argument. In Toth, the Supreme Court "restrict[ed] court-martial jurisdiction to persons who are actually members or part of the armed forces" and held that it could not "be extended to civilian ex-soldiers who had severed all relationship with the military." Id. at 14. The appellant argues that he could not constitutionally be subjected to a trial by court-martial for offenses he committed while he was in the Army because jurisdiction terminated when he received a valid discharge from the Army. He relies on R.C.M. 202(a), Discussion (2), which provides: "In general, a person becomes subject to court-martial jurisdiction upon enlistment in or induction into the armed forces . . . [and jurisdiction] ordinarily ends on delivery of a discharge certificate or its equivalent to the person concerned issued pursuant to competent orders."

The crux of the appellant's argument is that once he received his valid discharge from the Army, he became a civilian. As a result, his valid military discharge from the Army terminated jurisdiction over him and the offenses he committed while serving in the Army. He contends that once military jurisdiction is properly terminated, it can never constitutionally be revived. Although Article 3(a), UCMJ, clearly authorizes revived jurisdiction, the appellant contends that such authorization is unconstitutional because it is inconsistent with the Supreme Court's decision in Toth. Additionally, he asserts, as Toth stated, "any expansion of court-martial jurisdiction like that in the 1950 Act[, 50 U.S.C. § 553,] necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals." Id. at 15. Because civilian courts are open, they are the proper place to try the appellant for the offenses he committed while serving in the Army. We disagree.

To distinguish Toth from the instant case, Toth had severed all relationship with the military when he was arrested for the crimes he committed while in the military. Conversely, the appellant in this case committed the charged offenses while in the Army and he voluntarily returned to military control

by enlisting in the Air Force. Moreover, the Supreme Court found the 1950 version of Article 3(a), UCMJ, unconstitutional, whereas, Article 3(a), UCMJ, enacted in 1986, and amended in 1992, confers jurisdiction over the appellant in this case. See R.C.M. 202(a), Discussion (2)(B)(ii). Thus, Toth is inapplicable here. Without question the appellant was validly discharged from the Army; but, as an Air Force member on active duty at the time of his trial, he was properly subject to court-martial jurisdiction under the UCMJ. Because the charged offenses occurred after 23 October 1992, the appellant could be tried for offenses he committed during the earlier term of service in the Army. See id.

The appellant also contends that Willenbring v. Neurauter, 48 M.J. 152 (C.A.A.F. 1998), supports his constitutional challenge. In that case, our superior court ruled that the military could assert court-martial jurisdiction over a reservist who committed misconduct while a member of the regular component. Id. at 158. The accused in Willenbring was discharged from the regular component of the Army and enlisted in the reserves the day after. While as a reservist, he was charged with rape, allegedly committed while he was serving as a member of the regular component. Pursuant to Article 2(d), UCMJ, 10 U.S.C. § 802(d),

he was involuntarily recalled to active duty. Id. at 154.

The appellant is correct in asserting that the holding in Willenbring precludes jurisdiction over a former service member who has completely severed all relationships with the military as a result of a valid discharge. If the appellant had not reenlisted in the Air Force, the military would not have jurisdiction to try him by court-martial for the offenses he committed in the Army. However, our superior court in Willenbring, 48 M.J. at 158, reaffirmed Article 3(a), UCMJ, and the concept of revived jurisdiction when it held: "[I]f a person is subject to military jurisdiction at the time of the trial and was subject to military jurisdiction at the time of the offense, that person may be tried [by court-martial] for offenses occurring during a prior period of military service." Because of the 1992 amendment to Article 3(a), UCMJ, the military retains jurisdiction for any offense committed in a prior enlistment subject to the statute of limitations. Additionally, court-martial jurisdiction is not limited to military offenses so the fact that a civilian court may have jurisdiction is not a bar to prosecution under the UCMJ. R.C.M. 201(d)(2). Therefore, once the appellant enlisted in the Air Force, he became subject to prosecution for all the offenses he committed while on active duty that

were within the statute of limitations. See Article 3(a), UCMJ.

The quality and fundamental fairness of the military justice system have improved significantly since the 1955 Supreme Court decision in Toth. Many of the concerns that the Supreme Court expressed in Toth have been corrected by changes to the UCMJ and the Military Rules of Evidence. In fact, the Supreme Court's decision in Solorio v. United States, 483 U.S. 435 (1987), to eliminate the service-connection requirement for subject-matter jurisdiction, is an indication of the Court's increased confidence in the system. The Congressional intent expressed in Article 3(a), UCMJ, to expand military jurisdiction to include all offenses committed in a prior enlistment, is clear. Additionally, our superior court has determined that the Constitution does not preclude a trial by court-martial after a valid discharge, as long as the individual is a member of the armed forces or in a status subject to military law at the time jurisdiction is exercised. Willenbring, 48 M.J. at 158. Moreover, the facts of this case give us no reason to conclude that Article 3(a), UCMJ, is unconstitutional as applied to the appellant.

Sentence Appropriateness

The appellant claims his sentence is inappropriately severe. Specifically, he

acknowledges that his actions warrant lengthy confinement, but he gives several reasons why he believes that confinement for life is far too severe based upon the facts of this case. First, he contends that we should consider the fact that he voluntarily turned himself in. Next, he avers that he protected his "children from further psychological harm by stipulating to their testimony" so they would not have to testify during an Article 32, UCMJ,[5] investigation or in court. He also provided evidence that he was sexually molested for several years as a young child. Most importantly, the forensic psychologist that testified on the appellant's behalf at his court-martial opined that the appellant has very good rehabilitation potential and has the ability to become a productive member of society "without any significant likelihood" that he will re-offend in the future. For these reasons, coupled with his assertion that this Court has never affirmed a case where a child sex offender was sentenced to confinement for life, the appellant asks this Court to reduce the amount of his confinement to no more than 38 years, which was the final offer from the government in pretrial negotiations.

This Court may only affirm those findings and sentences we find are correct in law and fact and determine, on the basis of the entire record, should

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[5] 10 U.S.C. § 832.

be approved. Article 66(c), UCMJ. In determining sentence appropriateness, we must exercise our judicial powers to assure that justice is done and that the accused receives the punishment he deserves. Performing this function does not authorize this Court to grant clemency. United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988). The primary manner in which we discharge this responsibility is to give individualized consideration to an appellant on the basis of the nature and seriousness of the offenses and the character of appellant. United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982).

In the instant case, the appellant was convicted of offenses that involved five different children. First, he raped his daughter, AE, when she was ten years old. He then repeatedly raped and sodomized his other daughter, BE, almost daily from the time she was four years old. Additionally, he committed indecent acts, used indecent language, and took indecent liberties with her over a period of several years. According to BE's stipulated testimony, her two brothers were sometimes in the room when the appellant touched her private parts. She recalled one occasion when her father asked her to take off her clothes and sit on top of her younger brother. The appellant also pled guilty to encouraging BE to put her hands down her older

brother's pants. Finally, his conviction for obstruction of justice involved BE's denial of the appellant's inappropriate activity with her and her ten-year-old friend.

According to Dr. Thomas Coleman, a clinical psychologist, BE and JE suffered behavioral and emotional trauma as a result of their father's sexual abuse. He predicts they will struggle with depression and have significant adjustment problems throughout the rest of their lives. In her stipulated testimony, AE expressed guilt and remorse because of the appellant's actions and stated that she did not trust a lot of people. These offenses also had a significant negative impact on the appellant's former and present wives. They both provided testimony describing their guilt and self-doubt for not protecting their children from the appellant.

Although the appellant had an excellent military record, turned himself in, pled guilty, and stipulated to the children's testimony, the appellant committed these offenses on almost a daily basis for several years. Based on the serious nature of the appellant's offenses and the number of victims in this case, his sentence is not inappropriately severe. See Healy, 26 M.J. at 395-96; Snelling, 14 M.J. at 268.

Other Issues

Finally, we considered the appellant's remaining assignments of error and find them to be without merit. See United States v. Eberle, 44 M.J. 374, 375 (C.A.A.F. 1996); United States v. Jordan, 57 M.J. 236, 238-39 (C.A.A.F. 2002); United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987).

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

Judge FINCHER participated in this decision prior to his reassignment.

JOHNSON, Judge (concurring in the result):

I cannot concur with the majority as it relates to the resolution of the third Issue; Whether the military judge abused his discretion in considering, over defense objection, sentencing evidence involving uncharged misconduct. At issue is the admission of a portion of a stipulation of expected testimony of BE:

> One time, the summer before Dad started in the Air Force, he called me

> into the computer room to look at something. This was after he was out of the Army. He showed me a picture of a woman having sex with a dog. He asked me if I would do that with Sammie. I said OK. Sammie was a dog that we were watching for some friends. Dad took me and Sammie into the basement. I took off my pants and underwear. I got down on my hands and knees. Dad put Sammie behind me and on my back. Sammie's nails were scratching up my back and it hurt. I stood up so Sammie could not be on my back anymore. I said that I didn't want to do that anymore and Dad said OK and we went upstairs. The only thing that happened between me and Sammie was his nails scratched my back.

The military judge admitted the testimony and addressed each of the stipulations of expected testimony: "And again, I'd be a little bit concerned if this was a members case, although I think that with an appropriate instruction that could be overcome given the amount of uncharged misconduct. But, I can certainly put it into its

proper context and believe that the probative value of the victim impact is not substantially outweighed by the undue prejudice or any of the other factors listed in [Mil. R. Evid.] 403." The military judge overruled the defense counsel's objection.

I cannot say the probative value of the uncharged misconduct is not substantially outweighed by the danger of unfair prejudice. However, although I find it was error to consider this evidence in aggravation, it was not prejudicial. The test for prejudice is whether the sentence adjudged was "no greater than that which would have been imposed if the prejudicial error had not been committed." United States v. Kinman, 25 M.J. 99, 101 (C.M.A. 1987) (citing United States v. Suzuki, 20 M.J. 248, 249 (C.M.A. 1985)). The facts in this case are particularly egregious. The majority opinion more than adequately describes the heinous nature of this appellant's crimes committed against his minor children. Had the military judge not admitted this uncharged misconduct, the sentence adjudged would be "no greater than that which would have been imposed if the prejudicial error had not occurred." See id.

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Chief Court Administrator